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No. _____

In The

SUPREME COURT OF THE UNITED STATES

EDWARD HANOUSEK, JR., Petitioner,

vs.

UNITED STATES OF AMERICA, Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Clean Water Act a "public welfare" statute (as the Ninth, Eighth and Second Circuits have ruled, but contrary to the rulings of the Fifth Circuit and arguably the Fourth Circuit) so as to justify criminal conviction and imprisonment, without proof of mens rea, for otherwise innocent conduct?

2. Does the Due Process Clause restrict eliminating mens rea for offenses punishable by significant terms of imprisonment of one year or more?

3. Does the unmodified word "negligently" in § 1319(c)(1)(A) of the Clean Water Act, a criminal statute that provides for both misdemeanor and felony penalties, mean negligence in an ordinary civil tort sense or negligence in an aggravated criminal sense?

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PETITION FOR WRIT OF CERTIORARI

Edward Hanousek, Jr. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this case.

OPINIONS BELOW

The Ninth Circuit's opinion is reported at 176 F.3d 1116 (9th Cir. 1999). The opinion is reproduced in Appendix A. The oral ruling of the United States District Court for the District of Alaska is unreported. It is reproduced in Appendix B.

JURISDICTION

The Ninth Circuit issued its opinion on March 19, 1999. On April 1, 1999, Hanousek timely filed a Petition for Rehearing *En Banc*, which the Ninth Circuit denied on June 7, 1999. The order denying rehearing *en banc* is reproduced in Appendix C. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., amend. V
Due Process Clause

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

Clean Water Act

33 U.S.C. § 1319(c)(1) (1994)
33 U.S.C. §§ 1321(a)(1), (b)(3) & (b)(4) (1994)
33 U.S.C. § 1362(6) (1994)

These statutes are reproduced in Appendix D.

Code of Federal Regulations

40 C.F.R. §§ 110.1 & 110.3 (1998)

These regulations are reproduced in Appendix E.

STATEMENT OF THE CASE

1. Basis for Federal Jurisdiction.

This petition concerns a criminal prosecution under federal law. The district court had jurisdiction because offenses against the United States were charged. 18 U.S.C. § 3231 (1994).

2. Factual Background.

This case arises out of an accidental spill of stove oil from a pipeline running alongside the White Pass & Yukon Railroad. Petitioner Edward Hanousek Jr. ***did not*** spill the stove oil, nor was he present when the spill occurred. Nevertheless, Hanousek was charged with "negligently" violating the Clean Water Act. He was convicted under a civil tort standard of negligence and sentenced to one year of confinement in correctional facilities.

The White Pass & Yukon Railroad connects Skagway, Alaska with Whitehorse, Yukon Territory and is owned by the Pacific & Arctic Railway and Navigation Company ("PARN"). In 1994, PARN began a realignment project to straighten a curve in the railroad track in a location known as "6-mile." The 6-mile project involved blasting rock outcroppings and using a backhoe to load the fractured rock into train cars for disposal. PARN hired Hunz & Hunz, an independent contractor, to do the job.

When the work started at the 6-mile site, Hunz & Hunz covered the petroleum products pipeline[1] adjacent to the tracks with railroad ties, sand and ballast. Hunz & Hunz also created a work platform of sand and gravel from which its backhoe operated. The work platform protected the pipeline from damage by providing between six and ten feet of cover over the pipeline. (CR 306, RT at 3-10; CR 303, RT at 15-9) Hunz & Hunz's backhoe operators were experienced in working around pipelines. (CR 306, RT at 3-4; CR 303, RT at 15-4) They testified that they knew where the pipeline was located and they knew they had to be careful to avoid damaging it. (CR 300, RT at 2-7, 2-25; CR 306, RT at 3-5, 3-6; CR 303, RT at 15-5, 15-8)

After Hunz & Hunz's work was underway, PARN hired Hanousek as roadmaster for the railroad. Hanousek's duties included overseeing the 6-mile project.

On the evening of October 1, 1994, Shane Thoe, a Hunz & Hunz employee, used the backhoe on the work platform to load rocks into a train. Once the train cars were loaded, the train departed and Thoe was alone at the site. Thoe noticed that some rocks had fallen and been pushed down the track by the train. The rocks were located outside the current work area, in a place where the work had been completed weeks earlier. (CR 306, RT at 3-21; CR 303, RT at 15-10) Because the work had been finished in the location where the rocks were, the protective cover over the pipeline there had been removed. (CR 303, RT at 15-12) The backhoe had not operated in the area for a couple of weeks. (CR 303, RT at 15-12)

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[1] Pacific & Arctic Pipeline, Inc. ("PAPI"), a sister company to PARN, owned and operated the pipeline. The United States Army originally installed the pipeline in the 1940s. At the 6-mile site, the Army installed the pipeline just below the surface of the ground, alongside the railroad tracks, and a stone's throw from the Skagway River.

Thoe decided to move the rocks with the backhoe instead of by hand. Thoe drove the backhoe off the work platform and into the unprotected area. He then began using the backhoe bucket to "sweep" the rocks away from the tracks. As Thoe did so, the backhoe bucket struck the pipeline below the surface of the ground and caused a crack. Stove oil (a light grade of diesel fuel) that the pipeline company was pumping from Skagway to Whitehorse that evening sprayed from the cracked pipeline.

Thoe immediately reported the accident by radio and the pipeline was shut down within a few minutes. (CR 300, RT at 2-13; CR 301, RT at 9-31; CR 257, RT at 2-21, 2-22, 2-47) Nonetheless, stove oil that escaped from the pipeline eventually seeped through the rail bed and into the nearby Skagway River over the course of the next few days. Witnesses reported seeing sheens of oil in the Skagway River after the accident.

Thoe and his employer, Dave Hunz, both admitted at trial that the accident was caused by Thoe's error. (CR 302, RT at 10-20, 10-21; CR 306, RT at 3-25) Hunz testified that Thoe should not have taken the backhoe off of the work platform. Hunz said: "Stay up on the work pad; that's where we're – we're supposed to be working off of." (CR 302, RT at 10-49) The other Hunz & Hunz backhoe operator testified that he "hardly ever – never" took the backhoe off the work platform. (CR 303, RT at 15-10)

Hanousek was not present at the 6-mile site at the time of the accident and he had no involvement in Thoe's actions that night. Hanousek was off duty and at home when Thoe's accident occurred. (CR 350, RT at 12-18, 12-19; CR 384, RT at 3-93, 3-94, 3-109)

3. Proceedings Below.

The government charged Hanousek with negligently discharging a harmful quantity of oil into the navigable waters of the United States in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3) (1994). At trial, Hanousek asked the district court to instruct the jury that mens rea in the form of criminal negligence was a necessary element of the crime. Hanousek's proposed instruction defined criminal negligence as a "gross deviation from the standard of care that a reasonable person would observe in the situation." Hanousek's proposed instruction was taken from the Model Penal Code's definition of the mental state of acting "negligently." 1 Model Penal Code § 2.02(2)(d) (1985).

The district court refused Hanousek's request and ruled that negligence in a civil tort sense was sufficient to establish the crime. The district court instructed the jury that negligence meant "the failure to use reasonable care."

Applying the civil negligence instruction, the jury convicted Hanousek of negligent discharge of oil. The district court fined Hanousek $5,000 and sentenced him to twelve months of confinement in correctional facilities (six months in prison, six months in a halfway house), to be followed by six months of supervised release.

Hanousek appealed to the Ninth Circuit, which affirmed the conviction. The Ninth Circuit ignored Hanousek's argument that the word "negligently" in the Clean Water Act had to be interpreted in light of the criminal context of the statute in which it appeared. The Ninth Circuit concluded that "negligently" in the statute meant only negligence in a civil tort sense was needed to impose criminal liability. 176 F.3d at 1120-21. The Ninth Circuit also rejected Hanousek's argument that the use of a civil standard to impose criminal responsibility violated

due process. The court of appeals said the Clean Water Act was a "public welfare" statute so that due process was no impediment to a civil tort standard being used to establish criminal responsibility. 176 F.3d at 1121-22.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The circuits are divided on the question of whether the Clean Water Act creates "public welfare" offenses. The Second, Eighth and Ninth Circuits have ruled that the Act is a "public welfare" statute under which the traditional mens rea requirement of criminal law may be eliminated. The Fifth Circuit has ruled to the contrary. The Fourth Circuit has said that the Clean Water Act is a "public welfare" statute in some applications, but it has nevertheless required mens rea as to each essential element of the substantive offense charged under the Act.

The question of whether the Clean Water Act is a "public welfare" statute is one of national significance. The number of criminal prosecutions under the Act, as well as under similar federal environmental statutes, has increased dramatically in recent years. Resolving the conflict in the circuits is especially important because of the extraordinary breadth of the Clean Water Act. The Act extends to the general public and regulates a broad class of items, including ones used in complete innocence by ordinary citizens.

This Court has recognized that eliminating mens rea as an essential element of a crime can violate due process. The exact parameters of due process as it relates to mens rea, however, are ill-defined. The lack of guidance on the issue has lead to conflicting decisions in the lower courts. The Court should provide the necessary guidance and address the restrictions that due process places on

dispensing with criminal intent. In particular, this case warrants consideration of the severity of the penalty that due process permits to be imposed for a non-mens rea offense.

Section 1319(c)(1) of the Clean Water Act makes it a criminal offense punishable by both misdemeanor and felony penalties to "negligently" violate the Act. The Ninth Circuit's interpretation of "negligently" conflicts with decisions of state courts of the last resort as well as the rules of statutory construction. The Ninth Circuit's interpretation will create difficulty in the proper application of other federal criminal statutes that use the undefined word "negligently." Imposing misdemeanor and felony penalties, including lengthy prison terms, based on mere civil negligence also raises fundamental policy questions about criminalizing morally innocent conduct.

I.

THE DECISIONS OF THE COURTS OF APPEALS CONFLICT ON THE IMPORTANT ISSUE OF WHETHER THE CLEAN WATER ACT IS A "PUBLIC WELFARE" STATUTE ELIMINATING MENS REA AS A REQUIREMENT FOR CRIMINAL CONVICTIONS.

This Court has long held that mens rea is ordinarily an essential element to a crime. *Morissette v. United States*, 342 U.S. 246, 250 (1951). "The existence of a mens rea is the rule of, rather than the exception to, the principles of Anglo-American criminal jurisdiction." *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 (1978). Underlying the Court's insistence on mens rea is the concern that its elimination would "criminalize a broad range of apparently innocent conduct." *Liparota v. United States*, 471 U.S. 419, 426 (1985). Mens rea serves to avoid

subjecting "law abiding, well-intentioned citizens" to possibly lengthy prison terms. *Staples v. United States*, 511 U.S. 600, 615 (1994). *Accord United States v. X-Citement Video*, 513 U.S. 64, 68-73 (1994).

The Court has approved eliminating mens rea only in cases involving so-called "public welfare" or "regulatory" offenses. *Staples v. United States*, 511 U.S. 600, 606 (1994). "Public welfare" or "regulatory" offenses are recognized in "limited circumstances." *Id.* at 607. Typically, the "cases recognizing such offenses involve statutes that regulate potentially harmful or injurious items." *Id.* As this Court explained in *Staples*, "as long as a defendant knows that he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' . . . he should be alerted to the probability of strict regulation." *Id.* (citations omitted).

The mere fact that an item is "dangerous" in a general sense, however, is not enough to support a "public welfare" offense or to permit the elimination of mens rea. "Even dangerous items can, in some cases, be so commonplace and generally available that we would not consider them to alert individuals to the likelihood of strict regulation." *Id.* at 611. For instance, the Court in *Staples* acknowledged that guns are dangerous, but it pointed out that there "is a long tradition of widespread lawful gun ownership by individuals in this country." *Id.* at 610. The Court said that because guns have been accepted as lawful possessions their "destructive potential . . . cannot be said to put gun owners sufficiently on notice of the likelihood of regulation" so as to justify the elimination of mens rea as a requirement for conviction under the National Firearms Act, 26 U.S.C. § 5861(d). *Id.* at 612.

In this case, the Ninth Circuit relied on the doctrine of "public welfare" offenses in ruling that mens rea was not

required to convict Hanousek under the Clean Water Act – mere civil negligence was enough.[2] The court based its decision on the earlier Ninth Circuit case of *United States v. Weitzenhoff*, 35 F.3d 1275 (9th Cir. 1994), *cert. denied sub nom., Mariani v. United States*, 513 U.S. 1128 (1995). In *Weitzenhoff*, the Ninth Circuit dealt with a criminal prosecution against sewage treatment plant workers who had dumped sewage sludge into the ocean at night. The *Weitzenhoff* court concluded, in very general terms, that the "criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution . . . and as such fall within the category of public welfare legislation." 35 F.3d at 1286.

In *Hanousek*, the Ninth Circuit accepted *Weitzenhoff* as settling the issue of whether the Clean Water Act as a whole was a "public welfare" statute. The *Hanousek* opinion simply cited *Weitzenhoff* and declared that "[t]he criminal provisions of the CWA constitute public welfare legislation." 176 F.3d at 1121.

Two other courts of appeals have similarly accepted the broad conclusion that the Clean Water Act is a "public welfare" statute. In *United States v. Hopkins*, 53 F.3d 533 (2d Cir. 1995), *cert. denied*, 516 U.S. 1072 (1996), the Second Circuit said that since a *majority* of the substances treated as pollutants under the Clean Water Act would alert an ordinary user "to the likelihood of stringent regulation" mens rea could be relaxed. 53 F.3d at 540. Similarly, the Eighth Circuit in *United States v. Sinskey*, 119

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[2] At common law mere civil negligence was not sufficient to satisfy mens rea. An aggravated form of negligence was required. Rollin M. Perkins & Ronald N. Boyce, *Criminal Law* 842 (3d ed. 1982) ("Common sense compels the conclusion that there may be a grade or degree of fault sufficient to call for payment of damages in a civil suit, but quite insufficient to authorize criminal punishment, and this is exactly the result reached by the common law.")

F.3d 712, 716 (8th Cir. 1997) said the Clean Water Act established "public welfare" offenses because it covered "obnoxious waste materials," such as the byproducts of slaughtered animals at issue in that case.

In contrast, the Fifth Circuit in *United States v. Ahmad*, 101 F.3d 386 (5th Cir. 1996) refused to classify the Clean Water Act as a "public welfare" statute for which strict criminal liability may be imposed. The defendant in *Ahmad* pumped gasoline from storage tanks on his property into a city sewer system. He claimed that he thought he was pumping water. The Fifth Circuit carefully followed this Court's decision in *Staples* and noted that "the key to the public welfare offense analysis is whether 'dispensing with mens rea would require the defendant to have knowledge only of traditionally lawful conduct.'" 101 F.3d at 391. Since the defendant's conduct was traditionally lawful, mens rea was required for a conviction. *Id.* The fact that gasoline was involved made no difference even though gasoline is obviously a dangerous commodity. The Fifth Circuit noted that, "[t]hough gasoline is a 'potentially harmful or injurious item,' it is certainly no more so than are [the] machineguns" at issue in *Staples*. *Id.*

See also United States v. Wilson, 133 F.3d 251, 263-65 (4th Cir. 1997) (referring to Clean Water Act as a public welfare statute "in some applications," but nevertheless requiring mens rea as to "each essential element of the substantive offense").

This conflict between the courts of appeals needs to be resolved. The issue of whether Clean Water Act can be properly classified as establishing "public welfare" offenses is one of national significance. Criminal prosecutions under the Clean Water Act and the other federal environmental laws have increased remarkably in recent

years. The Environmental Protection Agency's referrals of criminal cases to the Justice Department "have steadily and dramatically increased from 20 in fiscal year 1982 to 107 in 1992 to a record 278 in 1997." Kevin A. Gaynor & Thomas R. Bartman, *Criminal Enforcement of Environmental Laws*, 10 Colo. J. Int'l Envtl. L. & Pol'y 39, 40 (1999). "Criminal fines in fiscal year 1997 were a record $169.3 million. In fiscal year 1996, 221 defendants were criminally charged with environmental offenses, and individuals were sentenced to 1,116 months in prison." *Id.* The Clean Water Act accounts for 25 percent of all the prosecutions under the federal environmental laws. *Id.* at 42. Given the increasing number of criminal cases, the need for a definitive ruling on whether the Clean Water Act encompasses "public welfare" offenses is acute.

Moreover, addressing whether the Clean Water Act embodies "public welfare" offenses will provide important guidance to the lower courts in cases arising under other federal environmental statutes. The criminal provisions of the principal federal environmental laws share basic similarities. *See* Clean Water Act, 33 U.S.C. § 1319(c) (1994); Clean Air Act, 42 U.S.C. § 7413(c) (1994); Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928(d) (1994). This Court's decision on "public welfare" offenses in the context of the Clean Water Act will therefore clarify the law for cases arising under other statutes. Guidance from this Court on the mens rea requirements of the federal environmental laws is especially important because Congress failed to provide any. "In environmental law . . . Congress avoided addressing at all what it meant by the mens rea requirements it enacted." Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law: Reforming Environmental Criminal Law*, 83 Geo. L. J. 2407, 2453-54 (1995).

A definitive ruling on the correct application of the Clean Water Act is also needed because of the extraordinary breadth of the Act. "This statute has tremendous sweep. . . . Much more ordinary, innocent, productive activity is regulated by this law than people not versed in environmental law might imagine." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting on denial of rehearing *en banc*). The Clean Water Act does not just govern a limited class of potential defendants in regulated industries who might be presumed to know the requirements of the law. The Clean Water Act literally extends to every member of the public. Nor is the Clean Water Act restricted to obvious noxious pollutants such as toxic waste materials that are generally understood as being subject to governmental regulation. The Clean Water Act regulates a wide variety of common items that ordinary citizens handle in their everyday lives.[3]

Oil and petroleum products are covered by the Act. 33 U.S.C. § 1321(a)(1) (1994). Gasoline, kerosene, diesel fuel, motor oil, grease, lubricants, and a myriad of other petroleum products are all in everyday use by ordinary citizens. Under the Ninth Circuit's decision, if a simple accident occurs and so much as a few drops of these common products find their way into a waterway, criminal penalties may be imposed. The negligent discharge of a "harmful" quantity of oil into a waterway is a criminal offense under the Act (33 U.S.C. § 1321(b)(3) (1994)), and

[3] The definition of "pollutant" in the Clean Water Act is exceedingly broad and it includes "garbage, . . . biological materials, . . . heat, . . . rock, sand . . . ." 33 U.S.C. § 1362(6). Under this definition "skipping a stone into a lake" or "pouring hot, stale coffee down a drain" is a violation of the Act. *Weitzenhoff*, 35 F.3d at 1298 (Kleinfeld, J., dissenting on denial of rehearing *en banc*). "Hazardous substances" covered by the Act include items used by a wide cross-section of the public, *e.g.*, chlorine, formaldehyde, sodium hypochlorite (bleach). 40 C.F.R. § 116.4 (1998).

the accompanying regulations define a "harmful" quantity of oil as including even just "a film or sheen upon or discoloration of the surface of the water." 40 C.F.R. § 110.3 (1998).

Thus, a recreational fisherman who inadvertently spills a few ounces of fuel while filling the gas tank of his boat will be a federal criminal and may be imprisoned. A motorist on her way to work who negligently causes an automobile accident that results in gasoline or motor oil trickling into navigable waters abutting the highway will be subject to federal prosecution. And pity the productive citizens like Ed Hanousek whose jobs even temporarily require working, or overseeing others who work, with machines somewhere in the area of federal waters. If an on-the-job accident occurs that results in just a "film or sheen" of petroleum on the water, these productive citizens will face imprisonment and the lifetime stigma of being criminals.

Given the broad scope of the Clean Water Act, the Ninth Circuit's blanket pronouncement that the Act as a whole is a "public welfare" statute was erroneous.[4] Because the Act covers "usually licit and blameless conduct" that would not alert an individual "to the probability of strict regulation" *Staples*, 511 U.S. at 613 & 616, mens rea cannot be eliminated.

In view of the breadth of the Clean Water Act and its application to ordinary citizens from every walk of life,

[4] *Staples* teaches that the "public welfare" offense analysis turns on "the general class of items" regulated by the statute as a whole, not a "fluid" case-by-case examination of the circumstances of the particular defendant in each case. 511 U.S. at 612 n.6. The Ninth Circuit was out of step with *Staples* on this point. The Ninth Circuit ruled that the entire Clean Water Act constitutes a "public welfare" statute based only on the particular conduct of the defendants in the *Weitzenhoff* case. *Weitzenhoff*, 35 F.3d at 1285-86.

this Court should resolve the question of whether the Act embodies "public welfare" offenses for which mens rea may be eliminated. The issue is one of exceptional importance because hanging in the balance is "a fundamental purpose of criminal justice, sorting out the innocent from the guilty before imposing punishment." *Weitzenhoff*, 35 F.3d at 1293 (Kleinfeld, J., dissenting on denial of rehearing *en banc*).

II.

THE COURT SHOULD ADDRESS THE DUE PROCESS LIMITATIONS ON DISPENSING WITH MENS REA FOR OFFENSES THAT ARE PUNISHABLE BY SIGNIFICANT PRISON TERMS.

The extent to which mens rea is a requirement of due process is an important constitutional issue that this Court has only rarely touched on and never fully addressed. Accepting Hanousek's petition will give the Court the opportunity to speak to this fundamental question of constitutional law.

The Court has previously recognized that there are due process limitations on a legislature's ability to eliminate mens rea in defining a crime. In *Lambert v. California*, 355 U.S. 225 (1957) the Court held that due process was violated when California convicted a woman of failing to register as a felon without proof of mens rea.

Furthermore, the Court has often looked to historical practice under the common law to determine the requirements of constitutional due process. *E.g.*, *Montana v. Egelhoff*, 518 U.S. 37, 44-48 (1996); *Griffin v. United States*, 502 U.S. 46, 49-51 (1991). As noted previously, the common law did not permit a defendant to be convicted and imprisoned without proof of mens rea. *Morissette*, 342 U.S. at 250. This historical practice reaffirms the conclusion that "the mens rea principle must be given

constitutional effect." *United States v. Cordoba-Hincapie*, 825 F. Supp. 485, 515 (E.D.N.Y. 1993) (Weinstein, J.).

The exact parameters of due process as it relates to mens rea are exceptionally ill-defined. The most-widely cited decision that discusses mens rea in the context of due process is an opinion authored by Justice Blackmun when he was a judge of the Eighth Circuit. Judge Blackmun wrote:

> where a federal criminal statute omits mention of intent and where it seems to involve what is basically a matter of policy, where the standard imposed is, under the circumstances, reasonable and adherence thereto properly expected of a person, where the penalty is relatively small, where conviction does not gravely besmirch, where the statutory crime is not taken over from the common law, and where congressional purpose is supporting, the statute can be construed as one not requiring criminal intent. The elimination of this element is then not violative of the due process clause.

Holdridge v. United States, 282 F.2d 302, 310 (8th Cir. 1960).

The generalized listing of vague factors in *Holdridge* provides little practical guidance for the lower courts. The lack of guidance has lead to conflicting decisions. *United States v. Wulff*, 758 F.2d 1121, 1125 (6th Cir. 1985) (Migratory Bird Treaty Act violates due process in defining felony without requiring mens rea); *United States v. Engler*, 806 F.2d 425, 434-35 (3d Cir. 1986), *cert. denied*, 481 U.S. 1019 (1987) (felony provisions of Migratory Bird Treaty Act do not violate due process despite lack of mens rea).

This petition presents the Court with the opportunity to flesh out the constitutional scope of mens rea and to thereby set at least some parameters for the restrictions that due process places on dispensing with criminal intent. Because Hanousek was engaged in a long-standing legal activity and not alerted to the probability of strict regulation, due process should not permit criminal sanctions to be imposed upon him for conduct amounting to no more than civil negligence. Doing so would be recognizing "a rigorous form of strict liability" that this Court has indicated is improper. *Staples*, 511 U.S. at 607 n.3.

Moreover, the constraints that due process places on severe penalties being imposed for non-mens rea crimes is directly implicated in this case. The Court has repeatedly mentioned that the severity of the penalty has an important correlation to mens rea, but it has never decided what that correlation may be. In *Staples* the Court observed that "in a system that generally requires a 'vicious will' to establish a crime, . . . imposing severe punishments for offenses that require no mens rea would seem incongruous." *Staples*, 511 U.S. at 617. *See also United States v. United States Gypsum Co.*, 438 U.S. 422, 442 n.18 (1978) (citing Sayre, *Public Welfare Offenses*, 33 Colum. L. Rev. 55 (1933) for the proposition that "strict liability [is] generally inappropriate when offense punishable by imprisonment").

Hanousek was sentenced to one year of confinement in correctional facilities, the maximum period of time possible for a first offender, even though his

conduct was only blameworthy in a civil tort sense.[5] Hanousek's punishment is "incongruous" with our system of criminal law, for which mens rea has always been a polestar. The penalty imposed on Hanousek was not "relatively small," and it therefore begs the question of how severe the penalties for non-mens rea offenses can be before due process is violated. In the absence of a criminal mental state, one year of confinement in correctional facilities for a simple accident someone else caused conflicts with the fundamental conceptions of fairness that due process embodies.

III.

THE COURT SHOULD ADDRESS THE IMPORTANT QUESTION OF WHETHER THE UNDEFINED WORD "NEGLIGENTLY" IN A CRIMINAL STATUTE MEANS CIVIL OR CRIMINAL NEGLIGENCE.

Hanousek was convicted under § 1391(c)(1) of the Clean Water Act, which subjects one who "negligently violates" enumerated provisions of the Act to fines up to $25,000 per day and imprisonment up to one year. 33 U.S.C. § 1319(c)(1) (1994). The same section of the statute makes a second violation a felony that is punishable by fines up to $50,000 per day and imprisonment up to two years. *Id.*

The statute does not define what is meant by the word "negligently." In the courts below, Hanousek argued that the word "negligently" had to be interpreted in light of

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[5] The sentencing guideline the district court followed in sentencing Hanousek assumed "knowing conduct." U.S.S.G. § 2Q1.3, appl. note 3. Although the sentencing guideline authorized a downward departure for negligent conduct (*id.*), the district court ignored Hanousek's request for a downward departure on this basis.

the criminal context in which it appeared. "[T]he meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Hanousek also pointed to a number of aids to statutory construction that supported his interpretation, including:

(1) the rule that statutes should be construed in light of the common law (*Staples*, 511 U.S. at 605);

(2) the overall structure of the Clean Water Act with its hierarchy of administrative, civil and criminal penalties (33 U.S.C. §§ 1319(c), (d), (g) & §§ 1321(b)(6)-(8) (1994)), which suggests that civil standards should govern civil penalties and more culpable conduct is necessary for criminal penalties (*United States v. United States Gypsum Co.*, 438 U.S. 422, 442 (1978));

(3) the need to construe the statute to avoid unreasonable results, including the result of criminalizing a broad range of apparently innocent conduct (*United States v. X-Citement Video*, 513 U.S. 64, 69-71 (1994));

(4) the rule of lenity, which requires an ambiguity in a criminal statute to be construed in favor of the accused (*Liparota v. United States*, 471 U.S. 419, 427 (1985)); and

(5) the rule that statutes should be construed, whenever possible, to avoid raising substantial questions of constitutionality (*Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California*, 508 U.S. 602, 629 (1993)).

The Ninth Circuit ignored the criminal context of § 1319(c)(1) and ignored or dismissed these aids to statutory construction. Instead, the Ninth Circuit summarily concluded that the plain meaning of the word "negligently" was civil negligence. 176 F.3d at 1120. The Ninth Circuit based its interpretation on a college dictionary and the

definition of "negligence" in Black's Law Dictionary, which is derived from civil cases. *Id.* at 1120-21.[6]

This Court has never previously considered the meaning of "negligence" in the context of a criminal statute. The Ninth Circuit's decision, however, conflicts with several state court decisions that use the traditional men rea requirement to interpret the undefined word "negligence" in a criminal statute. "We interpret the mens rea element of negligence . . . to require a showing of criminal negligence instead of ordinary civil negligence. . . . We do not find the absence of definition of negligence in the statute indicative of legislative intent." *Santillanes v. State*, 849 P.2d 358, 365 (N.M. 1993). *Accord State v. Ritchie*, 590 So.2d 1139, 1149 (La. 1991); *State v. Grover*, 437 N.W.2d 60, 63 (Minn. 1989). The authoritative Model Penal Code is in full agreement with this view. 1 Model Penal Code § 2.02(2)(d) (1985). This Court has relied on the Model Penal Code in interpreting the mens rea requirements of federal statutes. *E.g.*, *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978).

Allowing the Ninth Circuit's decision to stand will lead to difficulty with the proper interpretation and application of other statutes. For instance, the Fastener Quality Act of 1990 bases misdemeanor and felony crimes on negligence, just like § 1319(c)(1) of the Clean Water Act. The Fastener Quality Act governs "fasteners," which are screws, nuts, bolts, studs and washers. 15 U.S.C. § 5402(5)

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[6] The Ninth Circuit also cited the phrase "gross negligence" in 33 U.S.C. § 1321(b)(7)(D) to support its interpretation. 176 F.3d at 1121. The phrase "gross negligence," however, was not added to the statute until 1990, three years after § 1319(c)(1) was enacted. The Ninth Circuit therefore relied on a later act of Congress to discern what an earlier Congress meant. "A later Congress cannot control the interpretation of an earlier enacted statute." *O'Gilvie v. United States*, 519 U.S. 79, 90 (1996).

(1994). The Act provides that one who "negligently fails to maintain records relating to a fastener" in violation of the Act is subject to fines and imprisonment of up to 2 years. 15 U.S.C. § 5408(c)(3) (1994).

If the Ninth Circuit's decision is allowed to stand, it will be persuasive authority for interpreting "negligently" in the Fastener Quality Act to mean ordinary civil negligence. The result will be that a person who is merely neglectful about the paperwork on nuts and bolts may be branded a felon and imprisoned for up to two years without any proof of mens rea. Such a harsh result would be shocking. Felony is "as bad a word as you can give to man or thing." *Morissette*, 342 U.S. at 250.

The extension of criminal liability to persons who are negligent only in a civil tort sense also raises fundamental policy questions about the overall direction of criminal law. "[B]lurring of the border between tort and crime predictably will result in injustice, and ultimately weaken the efficacy of the criminal law as an instrument of social control." John C. Coffee, *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B. U. L. Rev. 193, 193 (1991). "We undermine the foundation of criminal law when we so vitiate the requirement of a criminal state of knowledge and intention as to make felons of the morally innocent." *Weitzenhoff*, 35 F.3d at 1299 (Kleinfeld, J., dissenting on denial of rehearing *en banc*).

To ensure the future direction of criminal law is appropriate, this Court should grant Hanousek's petition and address the meaning of the word "negligently" in a criminal statute such as § 1319(c)(1) of the Clean Water Act.

CONCLUSION

For the reasons stated, Petitioner respectfully requests that this petition be granted.

DATED this 20th day of August, 1999.

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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. EDWARD HANOUSEK, JR., Defendant-Appellant.	No. 97-30185 DC No. CR-96-0040-JMF OPINION

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted
May 4, 1998-Seattle, Washington

Filed March 19, 1999

Before: David R. Thompson and A. Wallace Tashima,
Circuit Judges, and Tom Stagg, District Judge.*

Opinion by Judge Thompson

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*Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

SUMMARY

Criminal Law and Procedure/Environmental Law

The court of appeals affirmed a judgment of conviction. The court held that the Clean Water Act may impose criminal liability for ordinary negligence.

In October 1994, thousands of gallons of oil were discharged into the Skagway River when a backhoe operator struck a pipeline adjacent to a rail line operated by the White Pass and Yukon Railroad, causing a rupture. The backhoe operator was an employee of Hunz and Hunz, a contractor that had been hired by Pacific and Arctic Railway and Navigation Company to work on a rock-quarrying project along the rail line. Appellant Edward Hanousek, Jr. was Pacific and Arctic's roadmaster, and the supervisor of the quarrying project.

Hanousek was charged with negligently discharging a harmful quantity of oil into a navigable water of the United States in violation of §§ 1319(c)(1)(A) and 1321(b)(3) of the Clean Water Act (CWA). The indictment also charged Hanousek with conspiring to provide false information to Coast Guard officials who investigated the accident. Also charged with related offenses was M. Paul Taylor, a Pacific and Arctic officer.

The government's evidence showed that Hanousek was responsible for the rock-quarrying project; the project involved the use of heavy equipment and machinery along the worksite; Hanousek directed the daily activities of Hunz and Hunz employees and equipment; and that it was

customary to protect the pipeline with railroad ties and fill when using heavy equipment in the vicinity of the pipeline.

The government's evidence also established that when the work began, Hunz and Hunz had applied protective covering material to the pipeline, and that when Hanousek took over supervision of the project, no further sections of the pipeline were protected, including the site of the rupture.

Other government evidence indicated that although the quarrying work had been completed in the location of the rupture, rocks would fall off loaded railcars; that no policy prohibited the use of backhoes off the work platform for other activities; that a backhoe operator ruptured the pipeline while moving a rock with his machine; and that a harmful quantity of oil spilled into the Skagway.

The district court rejected Hanousek's proposed jury instruction that the government had to prove criminal negligence, as opposed to ordinary negligence, and rejected his proposed instruction that he could not be found vicariously liable for the negligence of the backhoe operator.

The jury convicted Hanousek on the substantive charge and acquitted him on the conspiracy count. At sentencing, the district court imposed an upward adjustment for Hanousek's supervisory role in the offense.

On appeal, Hanousek contended that the district court erred in rejecting his proposed jury instructions; the ordinary negligence standard for criminal liability violated due process; the prosecutor struck "foul blows" by inviting the jury to convict him on a theory of vicarious liability; the court's causation instruction failed sufficiently to inform the jury that to support a conviction, the accident must have been within the risk foreseeably created by Hanousek's conduct; and the evidence was insufficient to support his

conviction. Hanousek also challenged the district court's application of the Sentencing Guidelines.

[1] Sections 13 l9(c)(1)(A) and 1321(b)(3) of the CWA criminalize the conduct of which Hanousek was convicted. [2] Neither section defines the term "negligently," nor is it defined elsewhere in the CWA. The ordinary meaning of "negligently" is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. [3] If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly. [4] Congress intended that a person who acts with ordinary negligence in violating §1321(b)(3) may be subject to criminal penalties.

[5] The criminal provisions of the CWA constitute public welfare legislation designed to protect the public from potentially harmful or injurious items. Public welfare legislation may render criminal a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety. [6] A public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process.

[7] In the context of a public welfare statute, as long as a defendant knows he is dealing with a dangerous device of a character that places him in responsible relation to a public danger, he should be alerted to the probability of strict regulation. Hanousek did not dispute that he was aware that a highpressure petroleum products pipeline ran close to the surface next to the railroad tracks, and did not argue that he was unaware of the dangers a puncture would pose. Hanousek therefore should have been alerted to the probability of strict regulation. [8] Section 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct.

[9] The district court's instructions adequately explained to the jury that Hanousek could be convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others. The district court's failure to provide Hanousek's proposed instructions on vicarious liability did not constitute reversible error. [10] The prosecutor was appropriately arguing to the jury that Hanousek and Taylor failed adequately to protect the pipeline and that both should be held responsible for their negligent conduct.

[11] To establish causation, the government must prove beyond a reasonable doubt that the defendant's conduct was both the cause in fact and the proximate cause of the harm. To prove proximate cause, the government must establish that the harm was a foreseeable result of the conduct. [12] The causation instruction given by the district court was adequate. It required the jury to find that Hanousek's conduct had a direct and substantial connection to the discharge of oil. That was sufficient.

[13] The totality of the evidence was sufficient to support Hanousek's conviction for negligently discharging a harmful quantity of oil into a navigable water of the United States.

[14] The district court may make an upward adjustment if the defendant supervised one or more participants. A participant is a person who is criminally responsible for the commission of the offense, but need not have been convicted. The district court did not clearly err by finding that Hanousek was a supervisor because, although the backhoe operator was not prosecuted, he was a participant in the criminal activity, and Hanousek supervised the project.

COUNSEL

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Ellen J. Durkee, United States Department of Justice, Washington, D.C., for the plaintiff-appellee.

OPINION

THOMPSON, Circuit Judge:

Edward Hanousek, Jr., appeals his conviction and sentence for negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3).

Hanousek contends that the district court erred: (1) by failing to instruct the jury that the government must prove that he acted with criminal negligence as opposed to ordinary negligence, (2) by failing to instruct the jury that he could not be found vicariously liable, (3) by failing to instruct the jury properly on causation, and (4) by incorrectly applying the United States Sentencing Guidelines.

Hanousek also argues that section 1319(c)(1)(A) violates due process if it permits a criminal conviction for ordinary negligence and that, in any event, the evidence was insufficient to support his conviction. We have jurisdiction under 28 U.S.C. § 1291 and we affirm.

FACTS

Hanousek was employed by the Pacific & Arctic Railway and Navigation Company (Pacific & Arctic) as roadmaster of the White Pass & Yukon Railroad, which

runs between Skagway, Alaska, and Whitehorse, Yukon Territory, Canada. As roadmaster, Hanousek was responsible under his contract "for every detail of the safe and efficient maintenance and construction of track, structures and marine facilities of the entire railroad . . . and [was to] assume similar duties with special projects."

One of the special projects under Hanousek's supervision was a rock-quarrying project at a site alongside the railroad referred to as "6-mile," located on an embankment 200 feet above the Skagway River. The project was designed to realign a sharp curve in the railroad and to obtain armor rock for a ship dock in Skagway. The project involved blasting rock outcroppings alongside the railroad, working the fractured rock toward railroad cars, and loading the rock onto railroad cars with a backhoe. Pacific & Arctic hired Hunz & Hunz, a contracting company, to provide the equipment and labor for the project.

At 6-mile, a high-pressure petroleum products pipeline owned by Pacific & Arctic's sister company, Pacific & Arctic Pipeline, Inc., runs parallel to the railroad at or above ground level, within a few feet of the tracks. To protect the pipeline during the project, a work platform of sand and gravel was constructed on which the backhoe operated to load rocks over the pipeline and into railroad cars. The location of the work platform changed as the location of the work progressed along the railroad tracks. In addition, when work initially began in April, 1994, Hunz & Hunz covered an approximately 300-foot section of the pipeline with railroad ties, sand, and ballast material to protect the pipeline, as was customary. After Hanousek took over responsibility for the project in May, 1994, no further sections of the pipeline along the 1000-foot work site were protected, with the exception of the movable backhoe work platform.

On the evening of October 1, 1994, Shane Thoe, a Hunz & Hunz backhoe operator, used the backhoe on the work platform to load a train with rocks. After the train departed, Thoe noticed that some fallen rocks had caught the plow of the train as it departed and were located just off the tracks in the vicinity of the unprotected pipeline. At this location, the site had been graded to finish grade and the pipeline was covered with a few inches of soil. Thoe moved the backhoe off the work platform and drove it down alongside the tracks between 50 to 100 yards from the work platform. While using the backhoe bucket to sweep the rocks from the tracks, Thoe struck the pipeline causing a rupture. The pipeline was carrying heating oil, and an estimated 1,000 to 5,000 gallons of oil were discharged over the course of many days into the adjacent Skagway River, a navigable water of the United States.

Following an investigation, Hanousek was charged with one count of negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of the Clean Water Act, 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3). Hanousek was also charged with one count of conspiring to provide false information to United States Coast Guard officials who investigated the accident, in violation of 18 U.S.C. §§ 371, 1001.[1]

[1] The government also charged M. Paul Taylor, an officer of Arctic & Pacific and Arctic & Pacific Pipeline, Inc., with one count of negligently discharging a harmful quantity of oil into a navigable water in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3), one count of failing to report a discharge in violation of 33 U.S.C. §1321(b)(5), one count of conspiracy to make false statements in violation of 18 U.S.C. §§ 371, 1001, five counts of making false statements in violation of 18 U.S.C. §1001, and one count of obstructing justice. In the joint trial with Hanousek, the jury acquitted Taylor of all charges except two counts of making false statements in violation of 18 U.S.C. §1001.

After a twenty-day trial, the jury convicted Hanousek of negligently discharging a harmful quantity of oil into a navigable water of the United States, but acquitted him on the charge of conspiring to provide false information. The district court imposed a sentence of six months of imprisonment, six months in a halfway house and six months of supervised release, as well as a fine of $5,000. This appeal followed.

DISCUSSION

A. Negligence Jury Instruction

Hanousek contends the district court erred by failing to instruct the jury that, to establish a violation under 33 U.S.C. § 1319(c)(1)(A), the government had to prove that Hanousek acted with criminal negligence, as opposed to ordinary negligence, in discharging a harmful quantity of oil into the Skagway River. In his proposed jury instruction, Hanousek defined criminal negligence as "a gross deviation from the standard of care that a reasonable person would observe in the situation." See American Law Institute, Model Penal Code § 2.02(2)(d) (1985). Over Hanousek's objection, the district court instructed the jury that the government was required to prove only that Hanousek acted negligently, which the district court deemed as "the failure to use reasonable care."

Whether the jury instruction provided by the district court misstated an element of 33 U.S.C. § 1319(c)(1)(A) presents a question of statutory interpretation, which we review de novo. *See United States v. Weitzenhoff*, 35 F.3d 1275, 1283 (9th Cir. 1993).

Statutory interpretation begins with the plain language of the statute. *See Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). If the language of the statute is clear, we need look no further than that language

in determining the statute's meaning. *See United States v. Lewis*, 67 F.3d 225, 228 (9th Cir. 1995). "Particular phrases must be construed in light of the overall purpose and structure of the whole statutory scheme." *Id.* at 228-29. "When we look to the plain language of a statute in order to interpret its meaning, we do more than view words or subsections in isolation. We derive meaning from context, and this requires reading the relevant statutory provisions as a whole." *Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.)*, 53 F.3d 1064, 1067 (9th Cir. 1995).

[1] Codified sections 1319(c)(1)(A) & 1321(b)(3) of the Clean Water Act work in tandem to criminalize the conduct of which Hanousek was convicted. Section 1319(c)(1)(A) provides that any person who negligently violates 33 U.S.C. § 1321(b)(3) shall be punished by fine or imprisonment, or both.[2] Section 1321(b)(3) proscribes the actual discharge of oil in harmful quantities into navigable waters of the United States, adjoining shore lines or waters of a contiguous zone, as well as other specified activity.

[2] Neither section defines the term "negligently," nor is that term defined elsewhere in the CWA. In this circumstance, we "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." *Russello v. United States*, 464 U.S. 16, 21 (1983) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962)). The ordinary meaning of "negligently" is a failure to use such care as a reasonably prudent and careful person would use under similar circumstances. *See Black's Law*

[2] 33 U.S.C. §1319(c)(1)(A) provides that first-time negligent violators shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than one year, or by both. The same statute provides that second-time negligent violators shall be punished by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than two years, or both.

Dictionary 1032 (6th ed. 1990); *The Random House College Dictionary* 891 (Rev. ed. 1980).

[3] If Congress intended to prescribe a heightened negligence standard, it could have done so explicitly, as it did in 33 U.S.C. § 1321(b)(7)(D). This section of the CWA provides for increased civil penalties "[i]n any case in which a violation of [33 U.S.C. § 1321(b)(3)] was the result of gross negligence or willful misconduct." 33 U.S.C. § 1321(b)(7)(D). This is significant. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello*, 464 U.S. at 23 (quoting *United States v. Wong Kim Bo*, 472 U.S. 720, 722 (5th Cir. 1972)).

Hanousek argues that Congress could not have intended to distinguish "negligently" in 33 U.S.C. § 1319(c)(1)(A) from "gross negligence" in 33 U.S.C. § 1321(b)(7)(D) because the phrase "gross negligence" was only recently added to the statute in 1990. *See* Oil Pollution Control Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990). We reject this argument because Congress is presumed to have known of its former legislation and to have passed new laws in view of the provisions of the legislation already enacted. *See United States v. Trident Seafoods Corp.*, 92 F.3d 855, 862 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 944 (1997).

[4] We conclude from the plain language of 33 U.S.C. § 1319(c)(1)(A) that Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subject to criminal penalties.[3] We next consider Hanousek's argument that, by imposing an

[3] In light of our conclusion that 33 U.S.C. §1319(c)(1)(A) unambiguously permits criminal penalties for ordinary negligence, the rule of lenity has no application. *See Staples v. United States*, 511 U.S. 600, 619 n. 17 (1994).

ordinary negligence standard for a criminal violation, section 1319(c)(1)(A) violates the due process clause of the Constitution.

B. Due Process

We review de novo whether a statute violates a defendant's right to due process. *See United States v. Savinovich*, 845 F.2d 834, 838-39 (9th Cir. 1988).

[5] The criminal provisions of the CWA constitute public welfare legislation. *See Weitzenhoff*, 35 F.3d at 1286 ("The criminal provisions of the CWA are clearly designed to protect the public at large from the potentially dire consequences of water pollution, *see* S. Rep. No. 99-50, 99th Cong., 1st Sess. 29 (1985), and as such fall within the category of public welfare legislation."). Public welfare legislation is designed to protect the public from potentially harmful or injurious items, *see Staples v. United States*, 511 U.S. 600, 607 (1994), and may render criminal "a type of conduct that a reasonable person should know is subject to stringent public regulation and may seriously threaten the community's health or safety," *see Liparota v. United States*, 471 U.S. 419, 433 (1985).

[6] It is well established that a public welfare statute may subject a person to criminal liability for his or her ordinary negligence without violating due process. *See United States v. Balint*, 258 U.S. 250, 252-53 (1922) ("[W]here one deals with others and his mere negligence may be dangerous to them, as in selling diseased food or poison, the policy of the law may, in order to stimulate proper care, require the punishment of the negligent person though he be ignorant of the noxious character of what he sells."); *see also Morissette v. United States*, 342 U.S. 246, 256 (1952) ("The accused, if he does not will the violation, usually is in a position to prevent it with no more care than society might reasonably expect and no more exertion than it might reasonably exact from one who

assumed his responsibilities."); *United States v. Dotterweich*, 320 U.S. 277, 281 (1943) ("In the interest of the larger good it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."); *Staples*, 511 U.S. at 607 n.3 (reiterating that public welfare statutes may dispense with a "mental element").

Recognizing that our holding in *Weitzenhoff* would defeat his due process argument, Hanousek attempts to distinguish *Weitzenhoff*. The attempt fails. In *Weitzenhoff*, two managers of a sewage treatment plant operating under a National Pollution Discharge Elimination System permit were convicted of knowingly discharging pollutants into a navigable water of the United States, in violation of 33 U.S.C. §§ 1311(a) & 1319(c)(2). *See Weitzenhoff*, 35 F.3d at 1282-83. In rejecting the defendants' contention that the district court erred by failing to instruct the jury that the government had to prove that the defendants knew their acts violated the permit or the CWA, we held that the criminal provisions of the CWA constitute public welfare legislation and that the government was not required to prove that the defendants knew their conduct violated the law. *See id.* at 1286. We explained that, "[w]here. . . dangerous or deleterious devices or products or obnoxious waste materials are involved, the probability of regulation is so great that anyone who is aware that he is in possession of them or dealing with them must be presumed to be aware of the regulation." *See id.* at 1284 (quoting *United States v. International Minerals & Chem. Corp.*, 402 U.S. 558, 565 (1971)).

[7] Hanousek argues that, unlike the defendants in Weitzenhoff who were permittees under the CWA, he was simply the roadmaster of the White Pass & Yukon railroad charged with overseeing a rock-quarrying project and was not in a position to know what the law required under the CWA. This is a distinction without a difference. In the

context of a public welfare statute, "as long as a defendant knows he is dealing with a dangerous device of a character that places him 'in responsible relation to a public danger,' he should be alerted to the probability of strict regulation." *Staples*, 511 U.S. at 607 (quoting *Dotterweich*, 320 U.S. at 281). Although Hanousek was not a permittee under the CWA, he does not dispute that he was aware that a high-pressure petroleum products pipeline owned by Pacific & Arctic's sister company ran close to the surface next to the railroad tracks at 6-mile, and does not argue that he was unaware of the dangers a break or puncture of the pipeline by a piece of heavy machinery would pose. Therefore, Hanousek should have been alerted to the probability of strict regulation. *See id.*[4]

[8] In light of our holding in *Weitzenhoff* that the criminal provisions of the CWA constitute public welfare legislation, and the fact that a public welfare statute may impose criminal penalties for ordinary negligent conduct without offending due process, we conclude that section 1319(c)(1)(A) does not violate due process by permitting criminal penalties for ordinary negligent conduct.

C. Vicarious Liability Jury Instruction

Hanousek next contends that the district court erred by failing to instruct the jury that he could not be found vicariously liable for the negligence of Shane Thoe, the Hunz & Hunz backhoe operator.

We review de novo whether a district court's instructions adequately cover a defense theory. *See United States v. Mason*, 902 F.2d 1434, 1438 (9th Cir. 1990). We will

[4] Although Hanousek argues that "the harsh penalties that may be imposed for violations of § 1319(c)(1) are another indication that the law of 'public welfare' offenses should not be applicable," this argument was rejected in *Weitzenhoff*. *See Weitzenhoff*, 35 F.3d at 1286 n.7.

affirm a district court's refusal to give an otherwise proper theory-of-defense instruction if the instructions actually given, in their entirety, adequately cover the defense theory. *See id.*

The first of Hanousek's proposed instructions dealing with vicarious liability reads as follows:

> You are instructed that Defendant Edward Hanousek is not responsible for and cannot be held criminally liable for any negligent acts or omissions by Shane Thoe or other Hunz & Hunz personnel.

Hanousek also requested a more general instruction that "a person is responsible under the criminal law only for acts he performs or causes to be performed on behalf of a corporation."

The district court rejected Hanousek's proposed instructions without explanation. However, the district court did instruct the jury as follows:

> In order for the defendant Ed Hanousek to be found guilty of negligent discharge of oil, the government must prove the following elements beyond a reasonable doubt:
>
> 1. The particular defendant caused the discharge of oil;
>
> 2. The discharge of oil was into a navigable waterway of the United States;
>
> 3. The amount of oil was of a quantity that may be harmful; and
>
> 4. The discharge was caused by the negligence of the particular defendant.

[9] We conclude that the district court's instructions adequately explained to the jury that Hanousek could be

convicted only on the basis of his own negligent conduct and not on the basis of the negligence of others working at 6-mile. *See United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991) (stating that we consider the jury instructions as a whole and consider how they will be reasonably understood by the jury). Accordingly, the district court's failure to provide Hanousek's proposed instructions on vicarious liability does not constitute reversible error.

[10] In a related argument, Hanousek argues that the district court erred by allowing the government to strike "foul blows" during closing argument by inviting the jury to convict Hanousek on a theory of vicarious liability. We disagree. In the course of closing argument, the prosecutor stated, "[w]hen Shane Thoe hit that unprotected pipeline and that oil fired out of that pipeline, sprayed up into the air, and got into that Skagway River, these two defendants are guilty of negligent discharging [oil] into the Skagway River." The prosecutor also told the jury that "the buck stops" with Hanousek and M. Paul Taylor, an officer of both Arctic & Pacific and Arctic & Pacific Pipeline, Inc. When read in context, the prosecutor was appropriately arguing to the jury that Hanousek and Taylor failed to adequately protect the pipeline and that both should be held responsible for their negligent conduct. *See United States v. Prantil*, 764 F.2d 548, 555 (9th Cir. 1985) (stating that the district court must allow the prosecution the freedom to strike "hard blows" based on the evidence and all fair inferences drawn therefrom).

D. Causation Jury Instruction

[11] To establish the element of causation, the government must prove beyond a reasonable doubt that the defendant's conduct was both the cause in fact and the proximate cause of the harm. *See United States v. Spinney*, 795 F.2d 1410, 1415 (9th Cir. 1986). To prove proximate

cause, the government must establish that the harm was a foreseeable result of the conduct. *See United States v. Main*, 113 F.3d 1046, 1049 (9th Cir. 1997). In the context of an involuntary manslaughter prosecution, we recently stated:

> All of the authorities agree that to be guilty of involuntary manslaughter the harmful result must be within the risk foreseeably created by the accused's conduct; if the physical causation is too remote, the law will not take cognizance of it. *"The same result has been achieved by requiring that the accused's conduct be a substantial factor in causing the harmful result or that it be the proximate, primary, direct, efficient, or legal cause of such harmful result."*

Id. (quoting Charles E. Torcia, *Wharton's Criminal Law* § 26 at 148-151 (1993) (emphasis added)).

Hanousek contends that the district court's causation instruction failed to sufficiently inform the jury that, to find Hanousek guilty under 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3), the accident must have been within the risk foreseeably created by Hanousek's conduct.

The district court gave the jury the following instruction on causation:

> In order to prove that a particular defendant caused the negligent discharge of oil as alleged in Count 1 of the indictment, the government must prove beyond a reasonable doubt that:
>
> 1. The particular defendant's conduct had a direct and substantial connection to the discharge; and
>
> 2. The discharge would not have occurred but for the particular defendant's conduct.

Hanousek did not object to this instruction, but asked that the following instruction, taken directly from *Model Penal Code* § 2.03(3), also be given:

> The element of causation is not established if the actual result is not within the risk of which the particular defendant was aware or should have been aware, unless:
>
> (a) the actual result differs from the probable result only in the respect that a different person or different property is injured or affected or that the probable injury or harm would have been more serious or more extensive than that caused; or
>
> (b) the actual result involves the same kind of injury or harm as the probable result and is not too remote or accidental in its occurrence to have a just bearing on the actor's liability or on the gravity of his offense.

[12] The district court properly declined to provide the jury with the additional instruction Hanousek requested. The causation instruction given by the district court was adequate under *Main*. It required the jury to find that Hanousek's conduct had a "direct and substantial connection" to the discharge of oil. That was sufficient. *See United States v. Warren*, 25 F.3d 890, 895-96 (9th Cir. 1994) ("A court may reject portions of a proposed theory of defense that merely rephrase explanations of the law adequately covered elsewhere in the instructions.").

E. Sufficiency of the Evidence

Although Hanousek did not list sufficiency of the evidence as one of the issues in his briefs, he nevertheless included in his opening and reply briefs an extensive discussion of the evidence and argued that the evidence was

insufficient to support his conviction. The government responded to this argument in its brief, and both sides at oral argument argued the issue of whether the evidence was sufficient to support Hanousek's conviction. Because the issue has been presented in this way by the parties, and fully argued, we consider it.

We review the evidence in the light most favorable to the government to determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See United States v. Lennick*, 18 F.3d 814, 818 (9th Cir. 1994).

The government presented evidence at trial that Hanousek was responsible for the rock-quarrying project at 6-mile; that the project involved the use of heavy equipment and machinery along the 1000-foot work site; that Hanousek directed the daily activities of Hunz & Hunz employees and equipment; and that it was customary to protect the pipeline with railroad ties and fill when using heavy equipment in the vicinity of the pipeline. The government also presented evidence that when work initially began in April, 1994, Hunz & Hunz covered an approximately 300-foot section of the pipeline with railroad ties, sand, and ballast material to protect the pipeline; that after Hanousek took over responsibility for the project in May, 1994, no further sections of the pipeline along the work site were protected; and that the section of the pipeline where the rupture occurred was not protected with railroad ties, sand or ballast. Finally, the government presented evidence that although the rock quarrying work had been completed in the location of the rupture, rocks would sometimes fall off the loaded railroad cars as they proceeded through the completed sections of the work site; that no policy prohibited the use of backhoes off the work platform for other activities; that a backhoe operator ruptured the unprotected pipeline while using a backhoe to remove a rock

from the railroad tracks; and that a harmful quantity of oil was discharged into the Skyway River.

[13] The totality of this evidence is sufficient to support Hanousek's conviction for negligently discharging a harmful quantity of oil into a navigable water of the United States, in violation of 33 U.S.C. §§ 1319(c)(1)(A) & 1321(b)(3).

F. Sentencing

Based on an offense level of 12 and a criminal history category of I, the district court sentenced Hanousek to 6 months in prison, 6 months in a halfway house, and 6 months of supervised release.

1. Upward Adjustment for Supervisory Role

Hanousek contends that the district court erred by making a two-point upward adjustment under United States Sentencing Guidelines § 3B1.1(c) based on his role as a supervisor in a criminal activity. We disagree.

[14] Pursuant to U.S.S.G. § 3B1.1, the district court may make an upward adjustment if the defendant supervised one or more participants. *See United States v. Cyphers*, 130 F.3d 1361, 1363 (9th Cir. 1997). A participant is "a person who is criminally responsible for the commission of the offense, but need not have been convicted." *Id.* (quoting U.S.S.G. § 3B1.1 Application Note 1). Here, the district court did not clearly err by finding that Hanousek was a supervisor because, although the backhoe operator was not prosecuted, he was nonetheless a participant in the criminal activity, and Hanousek supervised the project at 6-mile.

2. Sentencing Form

Hanousek correctly notes that the sentencing form attached to the final judgment contains "mathematical errors" because it erroneously indicates that the imprisonment range for an offense level of 12 is up to 6

months (the actual range is 10 to 16 months, *see* U.S.S.G. Ch. 5 Pt. A) and that the supervised release range is up to 6 years (the maximum term of supervised release for a misdemeanor (other than a petty offense) is 1 year, *see* 18 U.S.C. § 3583(b)(3)). However, these errors were clerical and did not play a role in Hanousek's sentencing. At the sentencing hearing, the district court correctly stated that the guideline for an offense level of 12 was 10 to 16 months, and the district court imposed only 6 months of supervised release, well under the one-year maximum.

3. U.S.S.G. § 5C1.1(d)

United States Sentencing Guideline § 5C1.1(d) provides:

> If the applicable guideline range is Zone C of the Sentencing Table, the minimum term may be satisfied by-
>
> (1) a sentence of imprisonment; or
>
> (2) a sentence of imprisonment that includes a term of supervised release with a condition that substitutes community confinement or home detention according to the schedule in subsection (e), provided that at least one-half of the minimum term is satisfied by imprisonment.

Hanousek contends that, in imposing sentence, the district court relied on incorrect information from the probation officer that, under U.S.S.G. § 5C1.1(d), the entire minimum sentence had to be served as a term of imprisonment. We disagree. The probation officer did originally advise the district court incorrectly that the entire minimum sentence had to be served as a term of imprisonment. However, after the district court questioned the probation officer's reading of the guideline, the probation officer corrected herself by saying, "One-half of

the minimum term could be served in imprisonment. I'm sorry." The district court did not rely on incorrect information.

4. Departures

We lack jurisdictior to review the district court's refusal to depart downward from the Sentencing Guidelines. *See United States v. Webster*, 108 F.3d 1156, 1158 (9th Cir. 1997). The district court recognized that it had the discretion to make the departures requested by Hanousek, but chose not to do so. *See id.*

CONCLUSION

In light of the plain language of 33 U.S.C. § 1319(c)(1)(A), we conclude Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subjected to criminal penalties. These sections, as so construed, do not violate due process. Accordingly, the district court properly instructed the jury on ordinary negligence. We also conclude that the district court properly instructed the jury on causation and did not err by refusing to provide the jury with Hanousek's proposed jury instructions on vicarious liability. Finally, the evidence was sufficient to support Hanousek's conviction, and the district court properly imposed its sentence under the Sentencing Guidelines.

AFFIRMED.[5]

[5] Judge Stagg intends to file a separate dissenting opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	Case No. A96-0040 CR (JMF)
vs.	)	
M. PAUL TAYLOR, JR. and EDWARD HANOUSEK, JR.,	)	Anchorage, Alaska Wednesday, December 11, 1996 9:02 o'clock a.m.
Defendants.	)	TRIAL BY JURY - 16TH DAY

VOLUME XVI

PARTIAL TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE JAMES M. FITZGERALD
UNITED STATES DISTRICT JUDGE

THE COURT: I'm going – I came in prepared to rule on the – both Mr. Paul Davis' [sic] motion for judgment of acquittal and the motion of Edward Hanousek for judgment of appeal, and I'd also reviewed and undertake to –

undertaken to make a – come up with an interpretation of the term "negligently violates" as it's contained in Title 33 U.S. Code Section 1391, subpart (c)(1).

I'm going to rule on that because it does play a part in the decision relating to the Defendant Hanousek. On the issue of Taylor's motion for judgment of acquittal, I'm going to take a better look at the authorities than I have at this time, and I'll rule on it probably later in the day.

Here are my rulings that I am prepared to make. I've undertaken a review of whether the term "negligently violate" as used in Title 33 U.S. Code Section 1391(c)(1) refers to criminal negligence or simple negligence. The pertinent language of Section 1319 [sic], subpart (c)(1) is entitled Criminal Penalties and addresses negligent violations. The pertinent language provides that any person who negligently violates certain sections of the Clean Water Act shall be punished by a fine of up to $25,000 per day and imprisonment of up to one year.

The starting point for interpreting a statute and the language that – is the language of the statute itself. See Consumer ,Product Safety Commission versus GTE Sylvania, Incorporated, 447 U.S. 102 at 108, 1980. Here the plain language of the statute is:

> "Negligently violates; there is no reference to criminal negligence, or willful negligence. The reference to negligently violates is unambiguous, and where the language of the statute is unambiguous, the plain meaning controls. U.S. versus Curtis, 988 F.2d 946, Ninth Circuit 1993."

From the language of the statute (indiscernible) court, I conclude that Congress intended to impose liability for simple negligence. A review of the legislative history supports that conclusion. Congress' intent in passing the

Water Pollution Control Act was to eliminate discharges of pollution. Elimination of discharges of pollution could be more readily achieved through a simple negligence rather than a criminal negligence standard.

In the House debates, Congressman Vanek (ph) offered an amendment to provide for criminal penalties for anyone who negligently violated an administrative order. Congressman Hosha (ph) opposed the amendment, argued that, quote:

> "In this legislation, we already can charge a man for simple negligence. We can charge him with criminal violation under this bill for simple negligence," end of quote.

Congressman Vanek's amendment was rejected. See Committee Print: a Legislative History of the Water Pollution Control Act Amendments of 1972, Volume I, at pages 528 to 530. My review of the legislative history finds repeated references to punishing negligent violations of the Water Patrol – Pollution Control Act without mentioning criminal negligence. Nothing in the legislative history suggests that the Court should divert from the plain meaning of the statute. See Conference Report on the 1987 Water Pollution Control Act Amendments as Reported in the Clean Water Desk Book at 14 – 147, 1991.

I find that the term "negligently violates" as used in the statute means negligence, but not criminal negligence. Then –

(Pause)

THE COURT: I have reviewed Bacchian versus New Hampshire, 414 U.S. 478, Supreme Court 1974. That case had to do with a sale of a button said to be obscene, where a juvenile 14-year-old girl – the operator of the shop where the sale was made was charged with willfully

contributing to the delinquency of a minor, in violation of the state statute. The state supreme court held that under the statute, the state was required to prove that the willful – that the – that a willful component was included in the statute and required the state to prove that the operator acted voluntarily, unintentionally, and not because of mistake or accident.

United States Supreme Court reviewed the evidence and found that under the evidence the government had failed – state had failed to prove that the store operator personally sold the button to the girl, knowing her to be a minor, or that he personally caused another to sell her the button, although the operator conceded that he controlled the premises on the date the sale was made. This concession, however, failed to establish the willfulness requirement of the state statute. Certainly under the New Hampshire statute, the state failed to prove an essential element.

The reason I've undertaken to interpret the federal statute in the present case is to determine whether more than simple negligence is required. While Bacchian may be instructive, since it held that an operator or manager could not be held liable on a theory of strict liability under the New Hampshire statute. However, I'm not prepared to say Bacchian is controlling in the present case. I've interpreted the statute – federal statute to require the government prove the defendant negligent. Subsequent cases citing to Bacchian hold that a case stands for the rule that every essential element of a crime must be supported by relevant evidence. Bacchian as I read it does not hold that a manager or operator may not be held strictly liable under that statute.

So I'm going to take a look at the strict liability issue in light of those cases. I have, however, reviewed the evidence, and leaving aside the strict liability issue, I'm going to rule on whether or not simple negligence or negligence

has been established under the evidence insofar as both the Defendant Taylor and the Defendant Edward Hanousek. That is, whether leaving completely out of the decision the responsibility that may be imposed on a corporate officer under the doctrine of strict liability, I find that even construing the evidence on negligence, leaving apart strict liability, favorable to the government as I must at this time, there's not evidence upon which a reasonable juror might find Taylor negligent.

I'm not prepared at this time in view of the evidence that Edward Hanousek was in charge of day-to-day operations during the period in which the oil spill occurred at 6 Mile, that he may not be held contributory negligent in causing the oil spill. At this time I deny his motion for judgment of acquittal. However, if he should be found guilty of Count I, then this issue will be again considered.

APPENDIX C

FILED
JUN - 7 1999
Cathy A. Catterson, Clerk
U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, vs. EDWARD HANOUSEK, Defendant-Appellant.	No. 97-30185 DC # CR-96-00040-JMF ORDER

Before: THOMPSON and TASHIMA, Circuit Judges, and STAGG, District Judge.[1]

A majority of the judges on this panel have voted to deny the petition for rehearing. Judge Tashima has voted to deny the petition for rehearing en banc, and Judge Thompson recommended denial of the petition.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has

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[1] The Honorable Tom Stagg, Senior United States District Judge for the Western District of Louisiana, sitting by designation.

requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing, and the petition for rehearing en banc, are DENIED.

APPENDIX D

TITLE 33, UNITED STATES CODE

§ 1319. Enforcement

. . . .

(c) Criminal penalties

(1) Negligent violations

Any person who–

(A) negligently violates section 1311, 1312, 1316, 1317, 1318, 1321(b)(3), 1328, or 1345 of this title, or any permit condition or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator or by a State, or any requirement imposed in a pretreatment program approved under section 1342(a)(3) or 1342(b)(8) of this title or in a permit issued under section 1344 of this title by the Secretary of the Army or by a State; or

(B) negligently introduces into a sewer system or into a publicly owned treatment works any pollutant or hazardous substance which such person knew or reasonably should have known could cause personal injury or property damage or, other than in compliance with all applicable Federal, State, or local requirements or permits, which causes such treatment works to violate any effluent limitation or condition in any permit issued to the treatment works under section 1342 of this title by the Administrator or a State;

shall be punished by a fine of not less than $2,500 nor more than $25,000 per day of violation, or by imprisonment for not more than 1 year, or by both. If a conviction of a

person is for a violation committed after a first conviction of such person under this paragraph, punishment shall be by a fine of not more than $50,000 per day of violation, or by imprisonment of not more than 2 years, or by both.

. . . .

§ 1321. Oil and hazardous substance liability

(a) Definitions

For purpose of this section, the term –

(1) "oil" means oil of any kind or in any form, including, but not limited to, petroleum, fuel oil, sludge, oil refuse, and oil mixed with wastes other than dredged spoil;

. . . .

(b) Congressional declaration of policy against discharges of oil or hazardous substances; designation of hazardous substances; study of higher standard of care incentives and report to Congress; liability; penalties; civil actions; penalty limitations, separate offenses, jurisdiction, mitigation of damages and costs, recovery of removal costs; alternative remedies and withholding clearance of vessels

. . . .

(3) The discharge of oil or hazardous substances (i) into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone, or (ii) in connection with activities under the Outer Continental Shelf Lands Act [43 U.S.C. § 1331 et seq.] or the Deepwater Port Act of 1974 [33 U.S.C. § 1501 et seq.], or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management

Act [16 U.S.C. § 1801 et seq.]), in such quantities as may be harmful as determined by the President under paragraph (4) of this subsection, is prohibited, except (A) in the case of such discharges into the waters of the contiguous zone or which may affect natural resources belonging to, appertaining to, or under the exclusive management authority of the United States (including resources under the Magnuson-Stevens Fishery Conservation and Management Act), where permitted under the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, and (B) where permitted in quantities and at times and locations or under such circumstances or conditions as the President may, by regulation, determine not to be harmful. Any regulations issued under this subsection shall be consistent with maritime safety and with marine and navigation laws and regulations and applicable water quality standards.

(4) The President shall by regulation determine for the purposes of this section those quantities of oil and any hazardous substances the discharge of which may be harmful to the public health or welfare or the environment of the United States, including but not limited to fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

. . . .

§ 1362. Definitions

Except as otherwise specifically provided, when used in this chapter:

. . . .

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive

materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels or a discharge incidental to the normal operation of a vessel of the Armed Forces" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

APPENDIX E

CODE OF FEDERAL REGULATIONS

TITLE 40

§ 110.1 Definitions.

. . .

Sheen means an iridescent appearance on the surface of water.

§ 110.3 Discharge of oil in such quantities as "may be harmful" pursuant to section 311(b)(4) of the Act.

For purposes of section 311(b)(4) of the Act, dishcarges of oil in such quantities that the Administrator has determined may be harmful to the public health or welfare or the environment of the United States include discharges of oil that:

(a) Violate applicable water quality standards; or

(b) Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon adjoining shorelines.